



OVERVIEW OF CALIFORNIA LITIGATION PROCESS FOR BUSINESS OWNERS

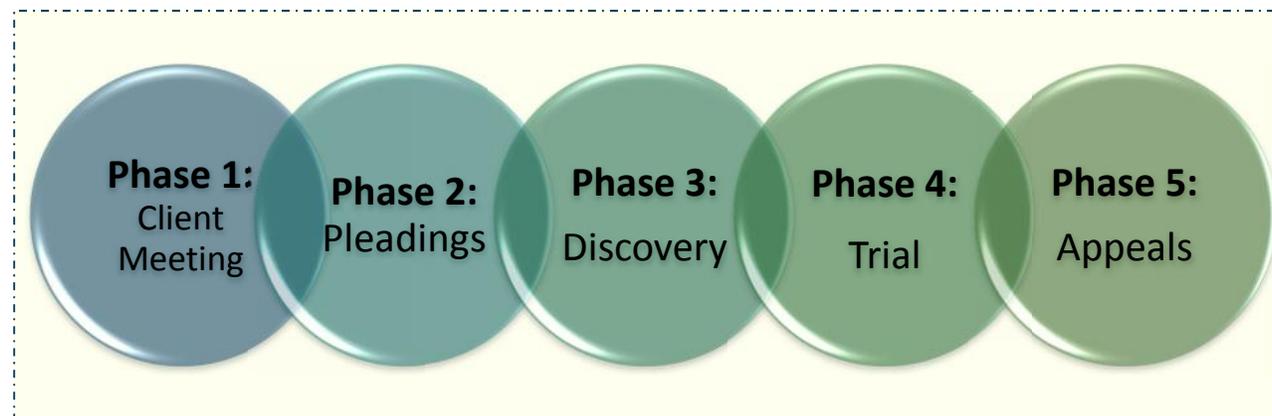
By Kathleen E. Finnerty

Litigation is the process through which most legal disputes are resolved. The court system, and the process of moving a civil case through that system, can be confusing to the uninitiated and difficult to comprehend for the veteran. Each case may move forward quickly and uniquely, or take unusual twists and turns. This article provides a useful overview of the process to help business owners gain a general understanding of how litigation evolves in California courts.

Phase 1:

Litigation¹ generally involves five (5) phases. The length of each phase varies with the legal and factual complexities of each case. The initial phase is the fact gathering meeting between the attorney and the client. It is essential that the client meet with the attorney at the earliest opportunity because certain important rights may be lost by delay. Once the attorney meets with the client, the attorney will review the available relevant documents, research the applicable law, and possibly speak with witnesses in order to chart a course which is in the best interest of the client.

THE LITIGATION PROCESS



¹ Civil litigation pertains to claims over \$7,500 (or \$5,000 for multiple filings) damages sought, with no criminal charges being involved. Cases under these dollar limits are generally addressed in Small Claims court.

Phase 2:

The Complaint

Litigation begins when the plaintiff files a complaint with the court and serves a copy of the complaint (by service of a summons) on the defendant(s). The complaint explains what the defendant(s) did (or failed to do) that caused harm to the plaintiff and the basis upon which the defendant(s) should be found legally responsible to the plaintiff. Civil claims are filed in either state or federal courts. The choice of courts may involve a complex legal analysis by the plaintiff's counsel, and may be challenged by the defense counsel through a removal action.

The Answer

Each defendant is given a specific amount of time to file with the court an answer to the complaint. The answer may explain the defendant's responses to each claim, or it may simply deny all allegations generally. In some instances, in lieu of an answer or reply, a party may file a motion requesting that the other party clarify or correct deficiencies in its factual allegations or legal theories, and this may lead to amended complaints or amended answers. Once the complaint and answer have been settled as to all defendants, the case is said to be "at issue", meaning that the issues for resolution are defined.

Case Duration and Preparation

The duration of a lawsuit depends on the number and complexity of the issues of the case, the amount of discovery conducted, and court scheduling and availability. The parties, guided by the rules of court, usually decide the timing of discovery. Trial dates are set by the court. Timing and scheduling differ between state and federal courts.

Thorough case preparation is critical to any successful litigation. Research of the law, document review and organization, and witness interviews help clients and their lawyers assess the merits of the claims and defenses. The extent to which these and other steps are needed is determined by the number and complexity of the issues of the case, and may be limited by the client's budget.

Phase 3:

Discovery is the method by which parties gather relevant information from each other or from third parties. Discovery is the longest and often most expensive part of the case; it begins soon after a lawsuit is filed and often does not stop until shortly before trial. During discovery, the parties ask for information about the facts and issues of the case. Information is gathered formally through written questions (known as interrogatories), requests for documents, and requests for admission (which ask a party to admit or deny statements of fact). These requests are responded to, in writing, with the lawyer generally drafting the responses for the client's review, based on available information.

Most cases will then proceed to depositions, the oral questioning of parties and witnesses while under oath, in front of a court reporter. Depositions are another key method of obtaining information, and may be used at trial to show inconsistencies in a witness' story or to question the witness' credibility. Depositions may also be videotaped and may be used in place of a witness who is not available to attend trial in person.

Often a claim or defense requires support from expert witnesses to explain technical information or to validate an argument. One or more experts might be needed to testify about the connection between the defendant's conduct, the loss suffered by the plaintiff, or the existence and amount of the plaintiff's damages. Expert witnesses work closely with the party and attorneys to prepare the party's case.

Motions

Before trial, the parties may use motions to ask the court to rule or act. Motions usually pertain to law or facts in the case, but sometimes they seek clarification or resolution of procedural disputes between or among the parties. Some motions, such as a motion for summary judgment ask the court to dismiss part or all of a plaintiff's case or a defendant's defense and dispose of issues without trial. Other motions might ask the court to order a party to produce documents or to exclude evidence from trial.

SETTLEMENT OPPORTUNITIES



Settlement

It is generally wise at the outset of any litigation proceeding to review the potential and prudence of an out-of-court settlement. Indeed, most matters settle before reaching the trial stage. Settlement can be discussed by any party at any time during litigation, and is often a cost-effective alternative to trial. Usually the court does not require the parties to discuss or attempt settlement, but most courts have procedures by which a party can request the court's assistance in settlement.

Phase 4:

Trial

At trial, the parties present evidence in support of their claims or defenses to a jury and/or judge. Immediately before trial, each party provides a trial brief to the judge which outlines the arguments and evidence to be used at trial. In a jury trial, both parties

question potential jurors during a selection process called *voir dire*. Once the jury has been selected, each party presents its outline of the case in an opening statement.

Evidence is then presented. Each party may call witnesses or introduce documents and exhibits in support of its arguments. The plaintiff presents evidence first, then the defendant. Sometimes, the plaintiff is allowed to present additional evidence called rebuttal evidence after the defendant has finished presenting its case.

Once all the evidence has been presented, the parties then give their closing arguments. After closing arguments, the court instructs the jury on the law to be applied to the evidence. The jury then deliberates and reaches a decision or verdict.

A party may challenge a jury's verdict. Errors of law committed by the trial court or a jury's disregard of law or evidence are common reasons for challenging a jury's verdict. A motion for judgment notwithstanding the verdict asks the court to disregard the jury's verdict and enter a different decision. A motion for a new trial asks the court to set aside the jury's verdict and order a new trial of the case.

The party who prevails at trial will often file a motion requesting the court to order the losing party to pay the prevailing party's costs to prosecute or defend the case. Recoverable costs are defined by rule, statute, or private agreement and generally do not include attorney fees. Recoverable costs rarely cover all out-of-pocket costs a party incurs during the course of a lawsuit. Attorney's fees may be recovered if a contract between the parties or an applicable statute provides it and then, only after a motion is filed with the court seeking recovery of attorney's fees.

Phase 5:

Appeal

Following trial, a party dissatisfied with the result may seek an appeal. During an appeal, a party asks another court to review the trial court proceeding. The parties present their arguments in briefs, which are submitted to the appellate court along with the record of evidence from the trial court. An appeal can extend the litigation process by a year or more.

The appellate court usually reviews a case for legal error only. Except under unusual circumstances, the appellate court will not review factual evidence or disturb a jury's or court's findings of fact. The appellate court announces its decision in a document called an opinion. The appellate court will affirm the verdict if it finds no error. If an error is found, however, the appellate court may reverse the verdict or order the trial court to conduct a new trial.

Alternatives to Litigation

Two alternatives to litigation are arbitration and mediation.

Arbitration is an adversarial proceeding in which the parties select a neutral third party, called an arbitrator, to resolve their dispute. The process is abbreviated and less formal than trial. Arbitration often arises from private agreement, but many courts also require the parties in smaller disputes to explore arbitration as an option to trial. Parties who agree to settle their dispute using "binding" arbitration usually cannot appeal the arbitrator's ruling to the court.

Mediation also involves a neutral third party, but it is the mediator's job to assist the parties' settlement efforts. The parties select the mediator who meets privately with each party to discuss the strengths and weaknesses of each side's case. The mediator helps the parties identify the risks of the case, and encourages them to consider how those risks can affect their goals.

Whether arbitration or mediation is feasible and practical usually depends on the parties' willingness to use these methods. Each alternative usually saves time and expense, but either might not result in a final resolution of the matter. The desirability of these alternatives should be evaluated early and often to explore resolution and potentially save client's significant time and money.

Conclusion

A positive result in a case is the product of close collaboration between the lawyer and the client. The client's business knowledge and familiarity of the facts is critical to effective case preparation. The lawyer can provide the legal expertise and strategic experience to help manage the litigation process.

The client's expectations and goals should be discussed and addressed on a regular basis to facilitate an open and candid working relationship. The objective of this relationship is a resolution consistent with the client's goals and business needs, within the confines of the law and the facts of the case.

Litigation is stressful and potentially very expensive. Even when necessary, it can also be time-consuming and distracting. Clear communication between the client and the lawyer, even when discussing certain harsh realities that may arise, is critical. Almost every general counsel of corporations, large and small, will articulate the same priority in legal representation – no surprises. Therefore, in selecting litigation counsel, the client should make certain that the lawyer knows how to listen, how to clarify complex issues, how to find creative solutions to problems, and how to see both the forest and the trees.